

THE EASTERN CARIBBEAN SUPREME COURT  
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE  
(Civil)

SLUHCV2016/0006

BETWEEN:

TERRENCE ALCEE

Claimant

and

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Lydia Faisal for the Claimant

Mrs. Karen Barnard for the Defendant

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2017: October 4; 25.

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**JUDGMENT**

[1] **CENAC-PHULGENCE, J:** In this case, as Cromwell J put in **R v Vu**,<sup>1</sup> the digital and internet age meets the law of search and seizure.

[2] The claimant, Mr. Terrence Alcee (“Mr. Alcee”) brought this claim against the Attorney General claiming the following relief: (a) a declaration that the seizure, detention and interference with his 3 laptop computers and cellular phone on 23<sup>rd</sup> July 2015 was illegal ab initio; (b) a declaration that the warrant under which the

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<sup>1</sup> 2013 SCC 60.

items were taken from his home and possession was defective and illegal; (c) an order for compensation for breach of his constitutional rights under sections 6 and 7 of the **Constitution of Saint Lucia**<sup>2</sup> (“the Constitution”) and (d) an order for compensation for the period during which the computers and cell phone were unlawfully detained by the defendant.

### **Claimant’s evidence**

- [3] On 23<sup>rd</sup> July 2015, Mr. Alcee was at his home at Chase Gardens when Police Constable 820 Norbert (“PC Norbert”) accompanied by three other officers came to his home and handed him a search warrant. The officers then proceeded to search his home and take three laptop computers (1 Toshiba laptop, 1 black Lenovo laptop, 1 white Canaima laptop) and one Nokia cell phone. Mr. Alcee said that no allegation of him having committed an offence was ever indicated to him and the officers simply informed him that they wanted to check the computers and were entitled to take them away for checking by the IT officer for the Royal Saint Lucia Police Force (“RSLPF”).
- [4] Mr. Alcee claims that his constitutional rights under sections 6 and 7 of the Constitution have been breached. He also claims that the whole incident with the search warrant caused him severe embarrassment as it was done in full view of his neighbours. In mid-September 2015, Mr. Alcee received a telephone call from someone calling from Police Headquarters asking him to come to collect his items at which point he informed the caller that he required the items to be brought back to his home from where they were taken and also confirmation in writing from the IT officer that the content and integrity of the items was not compromised.
- [5] Mr. Alcee avers that he was unable to have use of the laptop for his duties as a teacher. The laptop he said contained his notes, power point presentations, completed examinations, assignments and work related records. The Lenovo

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<sup>2</sup> Cap. 1.06, Revised Laws of Saint Lucia 2008.

computer also contained work related materials. As a result of not having his laptops Mr. Alcee says he was forced to reproduce several of the documents which was a time-consuming exercise.

- [6] Mr. Alcee said that his laptops were also used to provide entertainment for his family and to keep in touch with family via email and Skype. Mr. Alcee's evidence was that his cell phone is an integral part of his life as this was his means of communicating with his wife and other persons. The laptops also contained personal family items such as picture collages and other media. They also contained school and scholarship applications which he had intended to send out but was unable to do with the laptops being taken away. The absence of his cell phone also impacted this as he was unable to maintain any contacts pertaining to the applications or scholarships.

#### **Defendant's evidence**

- [7] The Attorney General in its response to Mr. Alcee's claim stated that the items taken from Mr. Alcee's residence were taken pursuant to a valid warrant. The evidence for the defendant was presented by the Attorney General, PC Norbert, PC 211 Livingston Norville ("PC Norville") and Sergeant of Police Philippa Flavien-Chiquot (at the time of the incident, Acting Inspector).
- [8] PC Norbert gave evidence that on 9<sup>th</sup> July 2015, he laid information before a magistrate to the effect that there were grounds for believing that there were at the premises of Mr. Alcee items, namely, cell phones, computers and electronic devices that would afford evidence as to the commission of the offence of libel. As a result of this, the magistrate issued a warrant to search for the property and that warrant is dated 9<sup>th</sup> July 2015.
- [9] The warrant to search was issued in Form 165 and on the form the sections 622 and 623 appear. The defendant contended that the search warrant was validly

issued. It authorized PC Norbert to enter the premises of Mr. Alcee and search for the said items and to bring them before a magistrate. The defendant's position is that the items were taken in the presence of Mr. Alcee and on the authority of a properly obtained warrant.

[10] PC Norbert's evidence was that he went to the home of Mr. Alcee on 23<sup>rd</sup> July 2015 to execute a search warrant consequent upon a report which had been made by Quintina Vidal and pursuant to a warrant which had been issued by a magistrate. PC Norbert's evidence is that on arrival at Mr. Alcee's residence, he introduced himself to him and showed him his identification card. He asked Mr. Alcee his name and confirmed that he was indeed Mr. Terrence Alcee.

[11] PC Norbert gave evidence that he informed Mr. Alcee that he had a warrant to search his premises and that he was investigating a report of stalking made against him by Quintina Vidal. His evidence is that he read the contents of the warrant to Mr. Alcee and handed him a copy. He said he conducted the search in the presence and viewing of Mr. Alcee and recovered the 3 laptops and one cell phone. He stated that he then asked Mr. Alcee to accompany him to Criminal Investigation Department for the purpose of witnessing the sealing of the items and Mr. Alcee did so. PC Norbert gave evidence that each item was placed in a separate clear exhibit bag and sealed. Mr. Alcee was then asked to sign across the seal of each bag which he did. PC Norbert said he signed the seals as well and he told Mr. Alcee that he would be submitting the items to the Police Information Technology Department for further investigations. After the process was completed, Mr. Alcee left.

[12] PC Norbert then on 27<sup>th</sup> July 2015, 3 days later handed over the items to PC Norville of the Information Technology Department. PC Norville subsequently returned the items to PC Norbert and informed him that he had found nothing of evidential value.

- [13] PC Norbert said he lodged the warrant at the First District Court and a stamped copy was returned to him. He said he attempted to reach Mr. Alcee twice and did not reach him the first time and on the second occasion, Mr. Alcee told him he would come for the items but never did, so he referred the matter to Inspector Chiquot.
- [14] PC Norville is an officer attached to the Communications and Information Technology Unit and has been so attached for about six years. He gave evidence of receiving a request from PC Norbert on 27<sup>th</sup> July 2015 to examine four devices. He said the devices were handed over by PC Norbert each sealed in a clear exhibit bag. PC Norville testified that he conducted an analysis of the items and he did not retrieve any information pertaining to the offence of stalking. He said the examination took several days as retrieving data from one item took several hours.
- [15] PC Norville stated that after he completed his examination he contacted PC Norbert to pick up the items and handed them to him making the requisite entry in the exhibit register. He contacted his supervisor at the time, Acting Inspector Chiquot and informed her that his analysis of the items was finished and they could have been collected.
- [16] PC Norville's evidence is that the integrity of the items remained exactly how he had received it and he did not tamper with the contents of the items. He said the procedure he utilized to conduct the forensic examination is one that allows the integrity of the exhibits to remain intact.
- [17] Sgt. Chiquot at the time of trial, Inspector Chiquot gave evidence that she contacted Mr. Alcee on 14<sup>th</sup> September 2015 and advised him that he could collect his items from her, being 3 laptops and one cell phone. She said Mr. Alcee

informed her that he had to contact his lawyer before making a decision and he would contact her. She said she gave him her contact number. Sgt. Chiquot in her affidavit stated that on 16<sup>th</sup> September 2015, Mr. Alcee telephoned her. However, in cross-examination, she indicated that it was really on 17<sup>th</sup> September 2015 that Mr. Alcee had contacted her and told her that he had contacted his lawyer and he was awaiting further instructions from her as she was awaiting a reply from the Minister. Sgt. Chiquot said she told him the items were in her possession and he should contact her to collect them. She said she made an entry of her conversation with Mr. Alcee in the Station Diary which was exhibited to her affidavit but there is no such exhibit.

- [18] Mr. Alcee in cross-examination was very adamant that he never told Sgt. Chiquot anything about his lawyer waiting for a reply from the Minister. He admitted to receiving a telephone call sometime in September 2015 when he was asked to come for the items. He again reiterated the evidence which he had given that he requested that the items be returned to him at his residence and that he be given the assurance that the integrity of the items had not been compromised. Sgt. Chiquot in cross-examination confirmed that to date the items are still in her possession and have not been collected by Mr. Alcee.

**Issues:**

- [19] The following issues have been identified for consideration:
- [a] Whether the claimant has an alternative remedy which precludes him from seeking redress by way of this constitutional motion.
  - [b] Whether there was evidence on oath before the Magistrate which could have satisfied the Magistrate for the issue of a warrant.
  - [c] Whether the failure to state the offence rendered the warrant defective and therefore the search illegal.
  - [d] Whether the failure to bring the items seized before a magistrate renders the search illegal.

- [e] Whether the search of the computers and cell phone by PC Norville infringed Mr. Alcee's constitutional rights under sections 6 and 7 of the Constitution.
- [f] What damages, if any is Mr. Alcee entitled to?

### **Alternative Remedy**

- [20] At the outset, the defendant sought to argue that Mr. Alcee should not be permitted to maintain his action for constitutional redress as he had an alternative remedy in tort which he could pursue. Given that Mr. Alcee seeks to challenge the validity of the warrant by which the search was conducted, the Court could not agree with counsel for the defendant, Mrs. Karen Barnard ("Ms. Barnard") that there was an alternative remedy in tort which could address this or which was suitable to address this.<sup>3</sup>

### **Whether there was evidence on oath before the magistrate which could have satisfied the Magistrate for the issue of a warrant**

- [21] Counsel for Mr. Alcee, Mrs. Lydia Faisal ("Mrs. Faisal") submitted that PC Norbert failed to indicate the nature of the information laid before the magistrate and whether the said information could have satisfied the magistrate upon oath that the warrant was necessary. Counsel further submitted that there was no evidence that any hearing took place to satisfy the requirement that the warrant should only be granted following sufficient evidence on oath and that being the case, the grant of a warrant in these circumstances would contravene Mr. Alcee's rights guaranteed by the Constitution in sections 6 and 7.
- [22] Mrs. Faisal argued that there is nothing before the Court to show that PC Norbert supplied sufficient evidence on oath to satisfy the magistrate that there were reasonable grounds to ground the issue of a warrant except for the Complaint to Ground a Warrant for Property form and the warrant. Counsel suggested that the

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<sup>3</sup> See Ellis J in Shankiell Myland v Commissioner of Police et al GDAHCV2012/0045 at para 19-24, (delivered 9<sup>th</sup> May 2014, unreported).

fact that no evidence pertaining to the alleged offence was retrieved from the items supports this argument.

[23] Counsel for the defendant, Mrs. Barnard quoted the case of **R v IRC, ex parte Rossminster**<sup>4</sup> where Lord Justice Wilberforce stated as follows:

“There is no mystery about the word ‘warrant’: it simply means a document issued by a person in authority under power conferred in that behalf authorizing the doing of an act which would otherwise be unlawful. The person affected, of course, has the right to be satisfied that the power to issue it exists: therefore the warrant should contain a reference to that power. **It would be wise to add to it a statement of satisfaction on the part of the judicial authority as to the matters on which he must be satisfied but this is not a requirement and its absence does not go to validity.**” (My emphasis)

[24] There is indeed a rebuttable presumption summed up in the Latin phrase ‘omnia presumuntur rite esse’ which simply means that in law all things are presumed to be done correctly and properly. In the absence of any evidence which suggests bad faith on the part of the magistrate or that the magistrate did not have the power to issue a warrant upon being satisfied that there were reasonable grounds for its issue, it must be taken that the warrant was validly issued.

[25] Section 622 of the **Criminal Code**<sup>5</sup> is the relevant provision. It states as follows:

“Where a magistrate is satisfied upon oath that there is reasonable ground for believing that there is in any building, ship, carriage, box, receptacle or place-

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(b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence, he or she may at any time issue a warrant under his or her hand, authorising a police officer named in the warrant to search such building, ship, carriage, box, receptacle, or place for any such thing, and to seize and bring any such thing before the magistrate who issued the warrant or any other magistrate, to be dealt with by him or her according to law.”

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<sup>4</sup> [1980] AC 952 at 1000.

<sup>5</sup> Cap. 3.01 of the Revised Laws of Saint Lucia 2013.



- [26] It is for Mr. Alcee to rebut the presumption that the warrant was validly issued by putting evidence before the Court. It is for him to show that there was no lawful authority to issue the warrant or that the magistrate was not satisfied on oath that there were reasonable grounds for believing that the items to be found at the premises would afford evidence of the commission of an offence. The pleadings contain no such allegation that there was no evidence on oath to satisfy the magistrate that there were reasonable grounds for the issue of the warrant. This was raised in submissions but no evidence was pleaded in that regard. A claimant must set out the evidence on which he relies to ground a particular relief which he is seeking. It is not permissible to not do so and raise it in submissions.
- [27] Section 622 clearly empowers the magistrate to issue a warrant once satisfied on oath. As Mrs. Barnard argued, the section does not say how the information on oath must be given and it would seem that it can be done by way of affidavit or oral statement on oath. In this case, the evidence revealed by PC Norbert in cross-examination supports the fact that the information laid before the magistrate was done on oath. PC Norbert testified to going to the magistrate's residence, being questioned by her and he having taken the oath on the Bible before the magistrate. The Court also notes that the relevant sections which grounds the magistrate's authority to issue a warrant and for the complaint to be laid before the magistrate are quoted at the top of the form as sections 622(b) and 623.
- [28] The mere fact that no evidence was retrieved from the items pertaining to the alleged offences to my mind does not logically mean that there may not have been reasonable grounds for the suspicion of commission of an offence in the first place. Mr. Alcee has failed to show that the process by which the warrant was issued was unlawful or contrary to the provisions of the **Criminal Code**.

[29] Therefore, the Court concludes that the issue of the warrant by the magistrate in the circumstances of this case was not unlawful and the warrant was validly issued in furtherance of a criminal investigation.

**Whether the failure to state the offence rendered the warrant defective and therefore the search illegal**

[30] It is not disputed that the search warrant in this case did not have a description of the offence in respect of which the search was made stated on it when it was executed at Mr. Alcee's premises.

[31] Mrs. Faisal submitted that the warrant is required by statute to contain the offence in respect of which the warrant is issued. Counsel argued that section 622 does not leave it up to the police officer executing the warrant to explain the alleged offence to the person whose premises are to be searched.

[32] Mrs. Faisal argued that the requirement for the offence to be stated in the search warrant was to ensure that from the outset an individual would know why his constitutional rights (protection from arbitrary search or entry) are being overridden. The omission to include the offence in respect of which a search is proceeding in the search warrant form she argued would make the warrant invalid and the search pursuant to that warrant invalid. Counsel cited the case of **Regina v Q.M.P. Fisheries Ltd. et al**<sup>6</sup> in support of her submission.

[33] Counsel, Mrs. Barnard cited the case of **Attorney General of Grenada v Salisbury Merchant Bank Limited**<sup>7</sup> which cited **Attorney General v William**<sup>8</sup> in support of her contention that the absence of the offence on the search warrant did not make the process of the search of Mr. Alcee's premises illegal. It does not

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<sup>6</sup> 2001 BCPC 201.

<sup>7</sup> GDAHCVAP2002/0020 per Barrow JA [Ag.] at para 20.

<sup>8</sup> [1997] 3 LRC 22.

she argued make the warrant defective to the extent that the resulting search would be illegal.

[34] Mrs. Barnard submitted that there is no requirement in section 622 as to the recitals required to be included in a search warrant. There is no express requirement that the offence be stated. Applying the principle in **R v Secretary of State for the Home Department, Ex parte Jeyanthan**,<sup>9</sup> as stated by Lord Woolf, Mrs. Barnard submitted that even if Form 165 stipulates that the offence must be stated, a failure to identify or state an offence would not necessarily be fatal to the warrant.

[35] Section 622 of the **Criminal Code** which I have quoted above does not speak to a prescribed form but it would appear that Form 165 is commonly used to draw up search warrants. Form 165 forms part of the Fifth Schedule to the **Criminal Code** titled Blank Forms. This form calls for the insertion of a description of (a) the things to be searched for; (b) the offence in respect of which the search is made as in complaint and (c) for a statement of in what or where the things may be found.

[36] The case of **Jeyanthan** whilst it dealt with the consequence of failure to use a prescribed form for applying for leave to appeal provides useful guidance in this case. Lord Woolf was of the view that:

“...in determining the consequence of non-compliance with a procedural requirement that the court had to consider the language of the legislation and the legislator’s intent against the factual situation and seek to do what was just in all the circumstances; ...”

[37] Section 622 of the Criminal Code must be contrasted with section 578 which deals with warrants of arrest. Section 578 unlike section 622 states in detail the requirements for such warrants. For example, the section specifically states that

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<sup>9</sup> [2000] 1 WLR 354.

every warrant to arrest shall state briefly the offence or matter for which it is issued. This is in sharp contrast to section 622 which does not state what the contents of a search warrant are to be.

[38] Section 1084 of the **Criminal Code** states as follows:

“The forms set out in the Fifth Schedule to this Code with such variations and additions as the circumstances of the particular case may require, or forms to the like effect, **may be used in the cases to which they respectively apply**, and shall be deemed good, valid and sufficient for the purposes of this Code” (my emphasis)

[39] This section clearly shows that the forms are not prescribed forms and it is not mandatory that they are used, but clearly using them would certainly be desirable. Section 1084 to my mind suggests that the forms do not form part of the substantive law. Hence the reason for section 698 which states:

“No objection shall be taken or allowed, in any proceedings in the Court, to any complaint, summons, warrant or other form of procedure on the ground of any alleged defect in substance or in form....”

[40] As Harris J pointed out in **Asot Michael et al v The Attorney General et al**<sup>10</sup> in relation to the comparable section in the Antigua and Barbuda Magistrate’s Code of Procedure, the section does not distinguish between the types and warrants and therefore section 698 is applicable to a search warrant.

[41] The case of **Asot Michael** is again instructive in this regard. Harris J states at paragraphs 82 and 83 as follows:

“82. Viscount Dilhorne at pp 1004A, in the very same *Rossminster* case, H.L, noted also, that: “The Act does not prescribe that such a warrant must be in any particular form.” It appears to me that upon proper construction of section 38(1) of the Magistrates Code of Procedure Cap 255, that it too, does not expressly prescribe that warrants issued under it be in any particular form notwithstanding the availability of form 6 in the subsidiary legislation. As I said above (see para 53 and para 74) other sections of the Magistrates code do expressly provide in the substantive

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<sup>10</sup> ANUHCV2008/0097 delivered 30<sup>th</sup> June 2009 (unreported) at para 71.

Act (as opposed to, by implication, in the warrant Form in the schedule), information that should be recited on the face of other types of warrants. Had parliament intended that the search warrant under S. 38 also recite certain facts or the existence of certain circumstances, it would have done so in one of the, over forty (40), amendments to the Act since the first amendment in 1891. ...”

83. Again, in the instant case it is worth noting that the Claimant did not resist entry or question the validity of the warrant. Whether the warrant contains sufficient information on it to satisfy a house owner of the authority of the Police to enter and search his home, can ultimately be determined without this information recited on the face of the warrant. Clearly the greater the amount of information contained on the face of the warrant, the greater the level of transparency in the process. As to whether the absence of the highest level of transparency necessarily invalidates a search warrant, Justice Paul Stephens of the U.S. Supreme Court, in *Groh v Ramirez*, *Supra*, a case dealing with the 4<sup>th</sup> Amendment to the U.S Constitution – protection against arbitrary search and seizure – and more specifically, whether a significant misdescription of the property to be searched for, on the face of the warrant, would invalidate it, posed the question, in relation to what information needed be on the face of a search warrant; what if the house owner was illiterate, would the warrant be invalid as a result of such a misdescription or the absence of formal information on the face of the warrant? Would the Police be precluded from searching the premises until the house owner could get someone to read the warrant for him - such as his lawyer for instance? The Justice was suggesting that even if all information was recited on the face of the document, the requirement that a house owner needs to have all information to satisfy himself of the validity of the warrant would, in the case of an illiterate, be meaningless and tantamount to being absent. However, this absence of certain information does not necessarily invalidate a warrant. Is the purpose of the detail on the face of the warrant to inform the house owner of the basis of the authority of the Police or is it to inform the police as to the limits of their authority in conducting the search? Ultimately the matter before the US Supreme Court was determined in favor of the complainant on the basis of the plain words of their constitutional provision – fourth amendment – expressly required that the description of the items to be seized, to be recited on the face of the warrant and in that case the items were not so recited.”

[42] Harris J continued at paragraph 92:

“92. Lord Salmon supported Viscount Dilhorne in the House of Lords, in holding the warrant valid notwithstanding the absence of a reference to the criminal offence(s) on it[s] face: “I entirely agree with your Lordships

for the reasons which you have given that the warrants cannot be successfully attacked on the ground that they do not sufficiently particularize the offences to which they refer.” Lord Scarman, at pp1023 D said: **“The Judges warrant is not the authority for seizing and removing things found on the premises. That power is conferred by the statute ...as the Divisional court well said, the warrant is only the key of the door, it does not confer the power to seize and remove...”** Further, Lord Scarman observed that with respect to the contention that particulars of the offence suspected to have been committed be recited on the face of the warrant, that: “The statute contains no express provision spelling out such a requirement. Is the requirement to be implied? I know of no common law rule which compels the implication. Indeed, the common law supports the converse...” ... Section 38 of the Magistrates Code provides for the Magistrate being the one to be satisfied of the nexus between the property and the prescribed criminal offence(s). Once the magistrate’s satisfaction is shown - in this case by his signature on the warrant - it is not for the house owner to determine whether the criminal offence(s) alleged, can be substantiated or not and then proceed to stop or permit as the case may be, the police entry.” (My emphasis).

[43] The evidence of Mr. Alcee in cross examination clearly suggested that although the offence was not stated on the face of the warrant, he was told by PC Norbert of the report of stalking by Quintina Vidal and that he was looking for photos based on a report that Ms. Vidal had made. Whilst it is disputed as to whether the search warrant was initially read to Mr. Alcee as PC Norbert’s evidence suggested or was handed over to Mr. Alcee after he asked PC Norbert to see it, Mr. Alcee cannot say that he was clueless as to the reason for the search warrant from the start.

[44] I therefore conclude that the absence of the statement as to the offence on the search warrant cannot be fatal and cannot render the search warrant invalid and the resulting search unlawful or illegal.

#### **Whether the failure to bring the items seized before a magistrate renders the search illegal**

[45] Mrs. Faisal submitted that the law (section 622 of the **Criminal Code**) requires that the items taken pursuant to a search warrant be brought before a magistrate. She argued that in the case at bar, the items were not taken before a magistrate

but were handed over by PC Norbert to a third party, PC Norville, the Information Technology Officer so that the contents of the computers and cell phone could be searched which renders the search illegal.

- [46] Mrs. Barnard sought to rely on the dicta of Harris J in **Asot Michael** where he stated that it seemed to be practice throughout the Commonwealth Caribbean that property seized was brought before the magistrate at the first hearing of the charge laid against the intended defendant. The learned judge also discussed the fact that the section clearly requires that the goods seized be brought before a magistrate but he did however point out that the section did not say within what time this was to have been done and so in accordance with the **Interpretation Act**, it would have to be done within a reasonable time. Harris J also discussed the fact that clearly the practice of bringing the items seized evolved at a time when criminal matters were filed and brought before the court in a timely manner; almost immediately after the seizure and charge.
- [47] Mrs. Barnard argued that the items were brought before the magistrate as the search warrant was lodged at the First District office. That clearly cannot be what the legislation envisaged.
- [48] In **Asot Michael**, the amount of \$8,000.00 awarded was not only for the failure to bring the items before a magistrate but because the police also failed (a) to only seize documents permitted by the warrant or under the relevant legislation; (b) failed to prepare at the premises named in the warrant and to leave with the claimants an inventory of the property seized at the premises. It is also to be noted that in **Asot Michael** up to the time of trial, the property seized was still in police possession and no one had been charged and the property had not been returned some 4 months after seizure.

[49] In this case, the items are still in the possession of the police as testified by Inspector Chiquot but the clear evidence from Inspector Chiquot and Mr. Alcee himself is that Mr. Alcee was notified in mid-September 2015 that he could come to collect his items. Mr. Alcee's evidence is that he did not go to collect the items as he requested that the items be returned to his home in the same manner they had been taken and confirmation that the integrity of the computers and cell phone had not been compromised.

[50] I am of the view and conclude that the failure of the police to bring the items seized before the magistrate does not render the search illegal as the search itself was conducted pursuant to a valid warrant issued with proper authority by the magistrate. Neither is the warrant invalidated by such failure on the part of the police.

**Whether Mr. Alcee's constitutional rights under sections 6 and 7 of the Constitution were infringed**

[51] Section 6 of the **Constitution** addresses a citizen's right to protection from deprivation of property. It states as follows:

**"6. Protection from deprivation of property**

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1)—

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right—

...

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural



development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out),

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society;”

[52] I have already found that the search warrant which authorized the search and seizure of the computers and cell phone was a valid warrant and therefore there has been no infringement of Mr. Alcee’s rights under section 6 of the **Constitution**.

[53] Section 7 of the **Constitution** states as follows:

**7. Protection from arbitrary search or entry**

- (1) Except with his or her own consent, a person shall not be subjected to the search of his or her person or his or her property or the entry by others on his or her premises.
- (2) **Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—**
  - (a) **that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or the development or utilisation of any property for a purpose beneficial to the community;**
  - (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;
  - (c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or to that authority or body corporate, as the case may be; or
  - (d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order,

**and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.** (my emphasis)

- [54] The court must seek to balance the competing interests between Mr. Alcee's right not to be subjected to arbitrary search and seizure by the State and that of the legitimate need for law enforcement and the suppression of crime. In this case, as I have found, the search warrant was validly issued by a magistrate. The warrant authorized entry to search for and take computers, cell phones and other electronic devices. Therefore, in relation to the execution of the warrant, the police followed the terms of the search warrant. The items taken were expressly what the warrant permitted. The absence of the offence being stated on the face of the warrant or the fact that the items were not brought before a magistrate does not vitiate the entire process so as to render the search warrant illegal and therefore the search illegal. To my mind, in these circumstances, it cannot be said that Mr. Alcee's right to be protected from arbitrary search and seizure was infringed.
- [55] The relevant question I think is whether the search of the computers and cell phone by PC Norville constituted an infringement of Mr. Alcee's rights under section 7 of the **Constitution**.
- [56] It is to be noted that section 624 of the **Criminal Code** makes reference to a search warrant being issued to permit search of computer systems in a building or place for data. This section clearly contemplates a type of warrant addressing specifically the search for data on computer systems and perhaps is relevant to electronic devices on the whole as indeed present day phones and other electronic devices like tablets have capacities that are, for our purposes, equivalent to those of computers.<sup>11</sup>

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<sup>11</sup> See Cromwell J in R v Vu 2013 SCC 60.

- [57] Mrs. Faisal argued that there was no directive from a magistrate which permitted the search of the content of Mr. Alcee's computers, etc. in a place unknown to him and in his absence and by a person unknown to him. Counsel argued that neither PC Norbert nor PC Norville was authorised by the search warrant issued on 9<sup>th</sup> July 2015 to have done anything in excess of what was expressly authorised by the warrant and accordingly the search of the computer and cell phone data was illegal.
- [58] The search warrant issued on 9<sup>th</sup> July 2015 was specific. It stated that it authorized PC Norbert to enter Mr. Alcee's premises to search for computers, cell phones and electronic devices and to bring these before a magistrate. It did not authorize any other search. Mrs. Barnard sought to argue that the warrant was issued in relation to suspicion of the offence of libel and therefore by authorizing search for computers and cell phone, it contemplated search of the data on them. I am afraid I cannot agree with this submission. As Ellis J pointed out in **Shankiell Myland v Commissioner of Police et al**,<sup>12</sup> the traditional warrant is directed at tangible rather than intangible data. A similar argument advanced by the Crown was swiftly rejected by the Court in the **Vu** case.
- [59] The discussion in the case of **R v Vu** at paragraphs 41-45 is very instructive as Cromwell J looks at the differences between computers and other receptacles. I summarize his observations for the purposes of this judgment as follows:
- (a) Computers store immense amounts of information, some of which, in the case of personal computers, will touch the "biographical core of personal information". The scale and variety of this material makes comparison with traditional storage receptacles unrealistic. A computer can be a repository for an almost unlimited universe of information.
  - (b) Computers contain information that is automatically generated, often unbeknownst to the user. Word-processing programs will often automatically

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<sup>12</sup> GDAHCV2012/0045, delivered 9<sup>th</sup> May 2014.

generate temporary files that permit analysts to reconstruct the development of a file and access information about who created and worked on it. Similarly, most browsers used to surf the Internet are programmed to automatically retain information about the websites the user has visited in recent weeks and the search terms that were employed to access those websites. In the context of a criminal investigation, however, it can also enable investigators to access intimate details about a user's interests, habits, and identity, drawing on a record that the user created unwittingly. This kind of information has no analogue in the physical world in which other types of receptacles are found.

- (c) A computer retains files and data even after users think that they have destroyed them. Computers thus compromise the ability of users to control the information that is available about them.
- (d) The physical presence of the receptacle upon the premises permits the search. While documents accessible in a filing cabinet are always at the same location as the filing cabinet, the same is not true of information that can be accessed through a computer. When connected to the Internet, computers serve as portals to an almost infinite amount of information that is shared between different users and is stored almost anywhere in the world. Similarly, a computer that is connected to a network will allow police to access information on other devices. Thus, a search of a computer connected to the Internet or a network gives access to information and documents that are not in any meaningful sense at the location for which the search is authorized.

[60] I believe that the above discussion dispels any notion that a search warrant to seize computers or other electronic devices also gives the right to search the computer. And I dare say that this is so even if the offence is one which intimates that it is the data on the computer which is relevant rather than the physical computer or device.

- [61] The rights guaranteed by the **Constitution** are to be jealously guarded and so there must be express authority to conduct the particular search required. It cannot be left open to interpretation. If this were not the case, section 624 would be unnecessary. It is clear that the **Criminal Code** recognizes in some measure that searches for data on computers require special treatment and has sought in a small way to move with the advances in technology.
- [62] Counsel, Mrs. Faisal referred to the case of **R v Singh**<sup>13</sup> in support of her submission that the search of the computers and cell phone was unlawful. In that case, the Court referred to the cases of **R v Spencer**<sup>14</sup> and **R v Morelli**<sup>15</sup> which have established that individuals have a strong privacy interest in the information contained in their computers and similar devices and that unlawful searches of computer devices heavily infringe on s. 8 rights (of the Canadian Charter of Rights).
- [63] The case of **R v Vu** is highly instructive. In that case the Supreme Court of Canada had to address the question whether the search warrant issued in that case authorised the search of computers and cellular telephone and whether section 8 of the Charter of Rights had been infringed. Section 8 of the Charter is similar to our section 7 of the **Constitution** and protects the citizen from unreasonable search and seizure. The search warrant in **Vu** did not specifically refer to the computers or authorize the search of them.
- [64] The Supreme Court very comprehensively addressed the matter and held that:
- “The traditional legal framework holds that once police obtain a warrant to search a place for certain things, they do not require specific, prior authorization to search in receptacles such as cupboards and filing cabinets. The question in this case is whether this framework is appropriate for computer searches. Computers differ in important ways

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<sup>13</sup> 2015 ONCJ 328.

<sup>14</sup> 2014 SCC 43

<sup>15</sup> 2010 1 S.C.R. 253.

from the receptacles governed by the traditional framework and computer searches give rise to particular privacy concerns that are not sufficiently addressed by that approach.”

[65] The Court held further that

“The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. It is difficult to imagine a more intrusive invasion of privacy than the search of a personal or home computer. Computers potentially give police access to an almost unlimited universe of information that users cannot control, that they may not even be aware of, may have tried to erase and which may not be, in any meaningful sense, located in the place of search. The numerous and striking differences between computers and traditional receptacles call for distinctive treatment under s. 8 of the Charter. The animating assumption of the traditional rule — that if the search of a place is justified, so is the search of receptacles found within it — simply cannot apply with respect to computer searches.”

[66] I find the dicta in **Vu** to be applicable and I reproduce it verbatim as it captures the true essence of this case. The Court went further to state:

“In effect, the privacy interests at stake when computers are searched require that those devices be treated, to a certain extent, as a separate place. Prior authorization of searches is a cornerstone of our search and seizure law. The purpose of the prior authorization process is to balance the privacy interest of the individual against the interest of the state in investigating criminal activity *before* the state intrusion occurs. Only a specific, prior authorization to search a computer found in the place of search ensures that the authorizing justice has considered the full range of the distinctive privacy concerns raised by computer searches and, having done so, has decided that this threshold has been reached in the circumstances of a particular proposed search. This means that if police intend to search any computers found within a place they want to search, they must first satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. **If police come across a computer in the course of a search and their warrant does not provide specific authorization to search computers, they may seize the computer, and do what is necessary to ensure the integrity of the data. If they wish to search the data, however, they must obtain a separate warrant.** In this case, the authorizing justice was not required to impose a search protocol in advance with conditions limiting the manner of the search. While such

conditions may be appropriate in some cases, they are not, as a general rule, constitutionally required.” (my emphasis)

[67] Cromwell J in **Vu** said that

“...the police must obtain judicial authorization for the search *before* they conduct it, usually in the form of a search warrant. The prior authorization requirement ensures that, before a search is conducted, a judicial officer is satisfied that the public’s interest in being left alone by government must give way to the government’s interest in intruding on the individual’s privacy in order to advance the goals of law enforcement: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160. Second, an authorized search must be conducted in a reasonable manner. This ensures that the search is no more intrusive than is reasonably necessary to achieve its objectives. In short, prior authorization *prevents* unjustified intrusions while the requirement that the search be conducted reasonably limits potential abuse of the authorization to search.

[68] Interestingly in **Vu**, the police officers searched the computers on the appellant’s premises and did not take them away as in the case at bar. However, the Court found that the warrant did not specifically authorize them to search the content of the computers.

[69] I have placed reliance on these Canadian authorities and the case of **Shankiell Myland v The Commissioner of Police et al** which is the only written judgment I found in our jurisdiction which specifically addresses the issue of whether specific authorisation to search computers and cell phones is required.

[70] Any time police intend to search the data stored on a computer found within a place for which a search has been authorized, they require specific authorization to do so. In this case whilst the warrant permitted the taking of the computers and cell phones, the subsequent search of the computer and phone data was conducted without authorization and is therefore unlawful and infringes Mr. Alcee’s right to be protected from arbitrary search.

[71] I am convinced based on the evidence led in this case that the police officers were of the impression, albeit mistakenly, that they were well within their rights given the fact that they had a valid warrant to proceed to permit the IT Officer, PC Norville to conduct the search of the computer and cell phone. Indeed, PC Norville in cross-examination referred to the fact that he was given a copy of the warrant as his authority to proceed. He admitted that he did not have any other order permitting him to search the devices. PC Norville said that he could not say verbatim what section 624 of the **Criminal Code** provided. PC Norville who conducted that search of the devices could not say whether he received the items on the same day they were taken from Mr. Alcee. He gave evidence that he produced a certificate that the integrity of the content of the items was not compromised and was preserved. That however could not save a search of the computers and cell phone already gone bad.

[72] I therefore conclude that the search of the computers and cell phone by PC Norville after the items were taken from Mr. Alcee's premises infringed his rights under section 7 of the **Constitution**.

### **Damages**

[73] Mr. Alcee has claimed damages for breach of his constitutional right pursuant to rule 56.8(1) of the **Civil Procedure Rules 2000** ("CPR"). Rule 56.8(2) provides the court may on a claim for relief under the Constitution award damages and an order for the return of property to the claimant if the:

- (i) claimant has included in the claim form a claim for any such remedy arising out of any matter to which the claim for an administrative order relates; or
- (ii) facts set out in the claimant's affidavit or statement of case justify the granting of such remedy or relief; and
- (iii) court is satisfied that, at the time when the application was made the claimant could have issued a claim for such remedy.



[74] The award of damages is a discretionary remedy and there is no general right to damages when the claimant is successful in his claim for an administrative order<sup>16</sup>. Mr. Alcee has not provided any evidence as to the damages which he has suffered in order to assist the Court in assessing the damages to which he may be entitled.

[75] A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damages and as to the amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit the award of nominal damages.<sup>17</sup>

[76] I have found that the search of Mr. Alcee's computers and cell phone was done without authorization which rendered the search illegal and infringed Mr. Alcee's rights under section 7 of the **Constitution**. I note that the computers and cell phone were lawfully seized pursuant to a validly issued warrant and therefore their detention for the period 23<sup>rd</sup> July to about 17<sup>th</sup> September 2015 was lawful as part of the ongoing police investigations. I do not find that period to be an unreasonable period. Having found that the items were not unlawfully detained, Mr. Alcee is not entitled to any damages.

[77] The evidence is that Mr. Alcee was called to collect the items which had been taken and he did not go to collect the items as he wished that they be returned to him in the same manner as they had been taken. Whilst the Court understands Mr. Alcee's concerns, his failure to collect the items which are still in the police possession some two years later cannot support his evidence that the computers

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<sup>16</sup> R v Metropolitan Borough of Knowsley ex parte Maguire [1992] COD 499.

per Lord Geoff in R v Secretary of State for Transport ex p Factortame Ltd (No.2) [1991] AC 603 a 672 H.

<sup>17</sup> Mc Gregor on Damages 19<sup>th</sup> ed. at paragraph 10-001.

and cell phone were such an integral part of his life. He could have collected the items and carry out his own investigations as to whether the integrity of the data on them had in any way been compromised by the illegal search. This will of course impact on any award of damages which this Court may be minded to make.

[78] It is clear that the police thought that they had authority to search the contents of the computers and cell phone, a belief which was clearly erroneous. In view of the fact that this area is a new one and guidance for the police and judicial officers alike may have been short or absent, I am minded to factor this into the amount awarded for damages.

### **Order**

[79] The Court declares and directs the following:

- (a) The declarations sought at paragraphs 1 and 2 of Mr. Alcee's claim are refused.
- (b) That the search of Mr. Alcee's computers and cell phone by PC Norville infringed his right to be free from arbitrary search and seizure guaranteed by section 7 of the **Constitution**.
- (c) In all the circumstances of this case, the defendant shall pay Mr. Alcee the sum of \$3,000.00 as general damages as a result of the infringement of his rights under section 7 of the **Constitution**.
- (d) Mr. Alcee collect the items taken from his home on 23<sup>rd</sup> July 2015 to wit: 1 Toshiba laptop, 1 black Lenovo laptop, 1 white Canaima laptop and one Nokia cell phone from Inspector Philippa Flavien-Chiquot within 7 days of the date of this order.
- (e) Should the items not be collected within the specified time, the defendant is at liberty to dispose of the said items.
- (f) Given the novelty of the issues which this claim raised, I make no order as to costs.

[80] This claim highlights the need for police officers to be adequately trained as to search warrants and the parameters within which they are to operate especially as relates to the new and emerging technologies. Perhaps a document outlining how a search warrant should be executed and highlighting how certain items are to be dealt with would be useful. It also seems that it is important that all officers are trained with respect to the relevant sections in the **Criminal Code** which touch and concern search warrants. Care must be exercised by both those seeking the issue of the warrant and those charged with the responsibility for issuing the warrant so that the constitutional rights of citizens are not trampled on.

[80] I thank counsel for their submissions.

**Justice Kimberly Cenac-Phulgence**

High Court Judge

**By the Court**

**Registrar**